ORAL ARGUMENT REQUESTED

Nos. 18-1161, 18-1182

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UPS GROUND FREIGHT, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 773,
Intervenor.

ON PETITION FOR REVIEW AND
CROSS-PETITION FOR ENFORCEMENT OF
ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER/CROSS-RESPONDENT UPS GROUND FREIGHT, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Petitioner/Cross-Respondent UPS Ground Freight, Inc. certifies the following:

(A) Parties, Intervenors, and Amici. The parties are Petitioner/Cross-Respondent UPS Ground Freight, Inc., Respondent/Cross-Petitioner National Labor Relations Board and Intervenor International Brotherhood of Teamsters Local Union No. 773.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner/Cross-Respondent UPS Ground Freight, Inc. certifies the following:

UPS Ground Freight, Inc. is a Virginia corporation engaged in less-than-truckload and truckload freight services.

UPS Ground Freight, Inc. is a wholly-owned subsidiary of United Parcel Service of America, Inc., which is a wholly-owned subsidiary of United Parcel Service, Inc., which is a publicly-held corporation.

(**B) Rulings Under Review**. The rulings under review in this case are the Decision and Order of the Board in Case 04–CA–205359 on June 1, 2018, and reported at 366 NLRB No. 100, and includes review of the

Decision on Review and Order in the underlying representation proceeding, Case 04–RC–165805.

(C) Related Cases. UPS Ground Freight, Inc. is unaware of any related case involving substantially the same parties and the same or similar issues.

/s/ Kurt G. Larkin
Kurt G. Larkin

Counsel for Petitioner/Cross-Respondent,
UPS Ground Freight, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 28(a)(1) and Circuit Rule 26.1, and to enable the Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel for Petitioner/Cross-Respondent UPS Ground Freight, Inc. states the following:

UPS Ground Freight, Inc. is a wholly-owned subsidiary of United Parcel Service of America, Inc., which is a wholly-owned subsidiary of United Parcel Service, Inc., which is a publicly-held corporation.

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GLOSSARY OF ABBREVIATIONS

AAP .....Advance Auto Parts

Act.....National Labor Relations Act

ADR..... Acting Regional Director of NLRB Region 4

APA .....Administrative Procedure Act, 5 USC §551 et seq.

Board/NLRB..... National Labor Relations Board

CoR .....Decision and Certificate of Representative, March 11, 2016

CHM .....NLRB Casehandling Manual, Part Two, Representation Case Proceedings

D&D .....Decision and Direction of Election, January 5, 2016

HO .....Hearing Officer

Memo .....NLRB General Counsel Memo 15-06, April 6, 2015, Guidance Memo on R-Case Procedure Changes

R-Case .....*UPS Ground Freight, Inc.*, 365 NLRB No. 113 (Jul. 27, 2017)

RFR .....Corrected Request for Review of Acting Regional Director's Decision and Direction of Election, April 5, 2016

Rule/Final Rule..... Representation Case Procedures, 29 C.F.R. Parts 101-103, 79 Fed. Reg. 74308

SOP ..... UPS Freight's Statement of Position December 18, 2015

Union.....International Brotherhood of Teamsters, Local 773

UPSF/Company.....UPS Ground Freight, Inc.

JURISDICTIONAL STATEMENT

The National Labor Relations Board ("Board") found that UPS Ground Freight, Inc. ("UPSF" or "Company") violated Sections 8(a)(1) and (5) of the National Labor Relations Act, ("Act"), 29 U.S.C. §151 et seq. *See UPS Ground Freight, Inc.*, 366 NLRB No. 100 (Jun. 1, 2018). The Board's Order is final with respect to all parties. UPSF timely filed its Petition for Review on June 11, 2018. The Board filed a cross-application for enforcement on July 2, 2018. This Court has jurisdiction pursuant to Sections 10(e) and (f) of the Act, 29 U.S.C. §§160(e)-(f).

STATEMENT OF ISSUES

1. Whether the Board's processing of the representation case proceeding underlying this matter violated the Administrative Procedure Act ("APA") and deprived UPSF of its rights to constitutional due process and an appropriate hearing under Section 9 of the Act, 29 U.S.C. §159.

2. Whether Frank Cappetta was a statutory supervisor who should have been barred from voting in the underlying representation election.

3. Whether the bargaining unit certified in the underlying representation proceeding is an appropriate unit under the Act.

4. Whether UPSF violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. §§158(a)(1)-(5), by declining to recognize and bargain with Teamsters Local 773 ("Union").

STATUTES AND REGULATIONS

UPSF is separately filing a Statutory Addendum to this brief containing all statutes and regulations cited herein.

STATEMENT OF THE CASE

This case is about a NLRB Acting Regional Director who weaponized the Board's controversial new election rules against UPSF, and the Board's "see no evil, hear no evil" approach to his actions. The end-result was a cascade of arbitrary and capricious rulings that ran roughshod over UPSF's statutory rights and deserve neither deference, nor approval.

On December 15, 2014, the Board published a rule entitled "Representation—Case Procedures," 29 C.F.R. Parts 101-103, 79 Fed. Reg. 74308 ("Rule") that took effect on April 14, 2015. Shortly before the Rule's effective date, the Board's General Counsel issued GC Memorandum 15-06 ("Memo"), which instructs Board Regional Directors on how to implement the Rule. General Counsel memoranda are not reviewed or adopted by the Board.

The Rule ostensibly was intended to "remove unnecessary barriers to the fair and expeditious resolution of representation cases, simplify representation case procedures, codify best practices, and make them more transparent and uniform across regions." Memo at 1. In fact, the Rule enacted sweeping changes that had the effect—and perhaps the purpose—of making it much harder for employers to win union elections. The Rule cut short the pre-election campaign period, burdened employers with onerous administrative tasks upon pain of waiver, required what amounts to one-way discovery, restricted employers' statutory right to communicate with employees, all but eliminated pre-election consideration of issues critical to employers in representation cases (such as supervisor status and voter eligibility), and drastically curtailed the scope of post-election review.

The Rule drew a sharp dissent from two Board Members. *See* 79 Fed. Reg. 74430-74460. Among other things, they expressed concern that the Rule reflected "a relentless zeal for slashing time from every state of current pre-election procedure," and that it "directs the exclusion of evidence regarding important election issues" and "codifies . . . private consultation and decisionmaking between hearing officers and regional directors," changes that would "predictably deny parties due process." *Id.*

at 74431-32. They predicted that the Rule "will in practice weigh far more heavily on employers than on unions." *Id.*

The Rule also was attacked in litigation. Those challenges failed due to the high burden of proving facial invalidity of an agency rule. *See Associated Builders & Contrs. Of Tex. v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce of the United States v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015). But the courts expressed no opinion on "as-applied" challenges that might arise in future cases.

This is such a case. UPSF filed this appeal to challenge a bargaining unit certified by the Acting Regional Director of NLRB Region 4 ("ARD") in the representation proceeding underlying this action. *See UPS Ground Freight, Inc.*, 365 NLRB No. 113 (Jul. 27, 2017)("R-Case"). UPSF objects to the ARD's prejudicial and, at times, irrational application of the Rule and Memo. His handling of the R-Case produced a series of arbitrary and capricious rulings that invalidate the Union's certification.

STATEMENT OF FACTS

A. Background And Pre-Hearing Actions

UPSF provides freight transportation and delivery services to customers throughout the United States. One such customer is Advance

Auto Parts ("AAP"). UPSF employs Road Drivers ("Drivers") to deliver products from nine AAP distribution centers to AAP retail stores in several states. Statement of Position ("SOP"), 12/18/2015, Att. B; Hearing Transcript ("Tr.") at 19-24; 36.

On December 10, 2015, the Union filed a petition to represent all UPSF Drivers at AAP's Kutztown, Pennsylvania distribution center. UPSF's review of the petition suggested the scope of the bargaining unit was much greater and that the only appropriate unit should include all nine AAP distribution centers. Developing evidence to support this position required analysis of the hundreds of other Drivers at AAP's eight other centers. Motion, 12/15/2015.

The petition raised many other issues, including: (i) whether the Board's traditional, "single-facility" standard, or the Board's then-extant "overwhelming community of interest" standard, *see Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011)("*Specialty Healthcare*"), governed to the bargaining unit determination; (ii) whether Frank Cappetta, the Kutztown Dispatcher who UPSF contends led the Union's organizing campaign, was a statutory supervisor; (iii) if so, whether his Union support invalidated the petition under the Board's

supervisory taint doctrine; (iv) whether Certified Safety Instructor and Dispatcher job classifications should be excluded from the bargaining unit and, (v) if so, whether Cappetta and Carl David, another unit employee who worked primarily as a Certified Safety Instructor, were ineligible to vote.

The Rule required UPSF to investigate these issues and: (i) file an SOP identifying the objections it wished to raise—on pain of waiver—within a mere seven days and (ii) be prepared to litigate those issues at a pre-election hearing just one day later. 29 C.F.R. §§102.63(a)-(b); 102.66(g). The Rule does not require the Union to make any similar filing.

The logistical challenge of meeting these deadlines was complicated since the petition was filed during the holiday season, one of UPSF's busiest times. This hindered UPSF's ability to interview witnesses and gather evidence. UPSF was also transitioning to a new, customer-imposed delivery schedule at Kutztown that increased its administrative burden. Moreover, Company counsel was unavailable to meet with witnesses until December 16, 2015, one day before the SOP was due. Motion, 12/15/2015.

In light of these factors, UPSF sought a two business-day postponement of the SOP (from Thursday, December 17 until Monday,

December 21, 2015) and the hearing (from Friday, December 18 until Tuesday, December 22, 2015). *Id.* Under the Rule, extensions of up to two business days may be granted upon a showing of "special circumstances," and beyond two business days upon a showing of "extraordinary circumstances." *Id.*; Memo at 7.

The ARD only partially granted the motion, ordering (without explanation) that UPSF's SOP be filed by noon on Friday, December 18, and that the hearing would begin at 10:00 a.m. on Monday, December 21. Order, 12/16/2015. Although he extended both deadlines by one day, his ruling allowed the Union almost three full days with UPSF's SOP, which contained all the issues and evidence UPSF intended to present at the hearing.

B. The Hearing[1]

Within hours after UPSF filed its SOP, the Region's Hearing Officer ("HO") notified UPSF that it would not be allowed to present supervisory taint evidence and directed it to submit a written proffer. She indicated the

[1] To avoid repetition, summaries of the evidence relating to the "merits" issues—i.e., Cappetta's supervisory status and the appropriateness of the proposed unit—appear in Sections C.1 and C.2, respectively.

Region would decide whether to investigate and "will have another Board Agent available to take statements on Monday on taint, if necessary." E-mail, 12/21/2015. UPSF submitted the proffer as requested. *Id*. The Company was never told whether anyone ever reviewed it.

The hearing took place on December 21st. Notably, neither the ARD's deliberations, nor the HO's discussions with him regarding any of the rulings described below, are captured in the transcript. Additionally, many of the HO's comments to the parties regarding the ARD's rulings occurred off the record. *See* UPSF's Offer of Proof at 4-5. UPSF does not know whether, or to what extent, the HO conveyed UPSF's position on any issue during her conversations with the ARD. As the dissenters to the Rule's adoption predicted, this was inevitable, given the Rule's requirement that the ARD—who never once entered the hearing room—actually make all discretionary rulings. *See* 79 Fed. Reg. 74447 (Rule produces decisions "made by an absentee regional director, who is not presiding over the hearing, and who is completely dependent on second-hand information conveyed by the hearing officer").

Although the Rule allows hearings to "continue from day to day until completed," *see* 29 C.F.R. §102.64(c), the Region seemed determined to

complete it in a single day. The Region apparently was following the Memo, which urges "every effort . . . to narrow the issues" and that hearing officers should "strive to ensure that the record is concise." Memo at 9, 11.

At the outset, the Union moved—over UPSF's objection—to add Certified Safety Instructors and Dispatchers to the bargaining unit. Tr. at 8-10. The HO disallowed evidence on the issue and the ARD never ruled on the motion. Tr. at 13.

During the hearing, the HO all but confined the parties to the building, effectively preventing meaningful recesses. She also made repeated requests for Company documents (such as organizational charts and job descriptions), then pestered counsel to obtain the information immediately, but without stopping the hearing. Tr. at 36-37; 99-100; 153-55.

The HO also refused to allow the Company adjournments of any length, let alone until the following morning, to prepare rebuttal testimony. Instead, she required the parties to present live testimony until almost 7:00 p.m., two hours beyond normal business hours. Tr. at 294-297; 312.

When it became clear that UPSF would not be permitted to return the following morning to present additional evidence, the Company asked to file a post-hearing brief. Tr. at 327. 29 C.F.R. §102.66(h) states that briefs

are allowed "upon special permission of the regional director," and the Memo provides Regional Directors may allow briefs where "the law is in flux, settled or recently changed," and where the case "presents issues that are of first impression, unusual, or novel." Memo at 24.

Here, both circumstances were present. The Board had never ruled whether *Specialty* applied to multi-facility units, nor had it ruled on as-applied challenges to the Rule, which UPSF was raising. SOP, Att. E. However, the ARD summarily refused UPSF's request for briefs: "[the ARD] feels that the issues are not so complex, so that we are not allowed the briefs." Tr. at 327-28.

The HO then directed the parties to present closing argument. Although the Memo directs hearing officers to provide parties a "reasonable period of time to prepare their oral arguments," Memo at 24, she offered UPSF ***30 minutes*** to prepare. Tr. at 329-333. UPSF objected, stating that 30 minutes was insufficient after a long day of testimony where UPSF was hearing the Union's evidence for the first time. Counsel asked to return at 8:00 a.m. the following morning (at that point, only 13 hours later), to present argument. The HO summarily refused that request: "With that, I'm going to start the half hour now." *Id*. at 330.

Unable to prepare a meaningful argument in 30 minutes, UPSF objected, asserting the Region was denying the Company due process and a fair hearing. Tr. at 331-33. Noting "it would be meaningless to try to make further oral argument under the circumstances," UPSF stood on its SOP and the evidence presented during the day. *Id*.

Finally, after distracting UPSF throughout the day with document requests, the HO abruptly abandoned all of them, refusing even to hold the record open so that UPSF could provide the requested information the following day. Tr. at 296-97; 348.

C. Decision And Direction Of Election

After rushing UPSF through the hearing and barring litigation of important issues, the ARD delayed issuing his Decision and Direction of Election ("D&D") until January 5, 2016. He rejected UPSF's substantive challenge to the bargaining unit and ruled the Union's single-facility unit was appropriate. D&D at 12. He ruled the HO had properly excluded evidence on inclusion of Certified Safety Instructors and Dispatchers because "resolution of the issue would not significantly change the size or character of the unit," and left the parties in limbo on whether those classifications were, or were not, in the unit. *Id*. at 13. For the same reason,

he also refused to rule on UPSF's challenge to Cappetta's supervisory status prior to the vote. *Id*.

The ARD made no findings on UPSF's allegation that Cappetta's organizing activities tainted the petition, stating only they "will be investigated administratively." D&D at 13. He also refused to address UPSF's other procedural objections, finding the Company was not prejudiced by any of the HO's rulings. Although counsel had specifically noted the HO's rulings made it impossible to present oral argument on the merits, the ARD stated that UPSF "suffered no prejudice" because, among other things, it "was able to present its oral argument at the conclusion of the hearing." *Id*. at 14 n. 8.

Finally, over UPSF's objection, Tr. at 316-319, the ARD ordered that the vote be conducted by mail ballot, not the Board's preferred (and far more common) manual voting method. D&D at 15. Significantly, the ARD's ruling was based on his erroneous interpretation of UPSF's election proposal. UPSF proposed a single day, split-poll manual election running from 3:00 a.m. – 5:00 a.m., and from 3:00 p.m. – 5:00 p.m., all to take place at the Kutztown distribution center. Tr. at 316-17. Its proposal allowed all eligible voters to vote ***before*** leaving the distribution center on their

assigned routes. UPSF also told the HO that it could arrange the schedule so that all employees would be present during the first voting window. Tr. at 319.

Despite all this, the ARD speculated voters would be "scattered" under Board precedent because "traffic and weather conditions, particularly in winter, may hinder employees from returning to the Employer's facility in time to permit them to vote." D&D at 15. UPSF objected and moved in writing for reconsideration. Letter to ARD, 1/6/2016. On January 7, 2016, the parties held a call with the ARD during which UPSF made a revised election proposal, offering a single polling time from 2:00 a.m. to 8:00 a.m. on a Wednesday of the ARD's choosing. UPSF again assured the ARD it would schedule dispatches so that all eligible employees could vote ***before*** leaving on their routes. This proposal, like UPSF's original proposal, eliminated concerns that employees would be scattered during the polling time. Letter to ARD, 1/7/2016.

The ARD rejected UPSF's revised proposal. ARD Letter Ruling, 1/11/2016. Curiously, he implied he lacked the authority to revise the election details after the D&D. The Rule, however, provides that Regional Directors "ordinarily will specify" election details in the D&D, but does not

require it. *See* 29 C.F.R. §102.67(b). And the Board's Casehandling Manual recognizes that "a determination may not be possible until, for example, after a decision and direction has issued." NLRB Casehandling Manual (Part Two) Representation Proceedings ("CHM") §11301.3.

Despite his conclusion, the ARD nevertheless noted he might have reconsidered if the parties had submitted a joint proposal. ARD Letter Ruling, 1/11/2016. Not surprisingly, the Union had already objected to a manual election. Tr. at 315.

On January 11, 2016, UPSF filed a Special Appeal and Request for Review with the Board seeking review of the ARD's erroneous decision. Special Appeal and Request for Review, 1/11/2016. The Board denied UPSF's request without comment. Ballots were mailed to voters on January 11, 2016, with a deadline to return them of January 29, 2016.

The ARD's ruling effectively terminated UPSF's campaign prematurely. Board precedent does not allow employers to hold group employee meetings once mail ballots are distributed to voters. This severely curtailed UPSF's free speech rights under the Act. *See* 29 U.S.C. §158(c).

D. Election Results & Post-Election Challenges

The mail ballots were counted on February 1, 2016, and the Union prevailed by a wide majority. Tally of Ballots. UPSF then filed Objections to the election and an accompanying Offer of Proof.[2] *See* Objections, 2/9/2016; Offer of Proof, 2/16/2016.

Additional rulings by the ARD prevented UPSF from obtaining key evidence needed for its Offer of Proof. On February 2, 2016, UPSF requested five subpoenas *duces tecum* pursuant to the Rule. *See* 29 C.F.R. §102.31(a); UPSF Request, 2/2/2016. UPSF made the request to obtain additional evidence of Cappetta's involvement in leading the Union's organizing campaign, thereby tainting the Union's petition. The same day, the ARD denied UPSF's request "based on the lack of a currently outstanding Notice of Hearing." Order, 2/3/2016.

Although constrained by the ARD's rulings, UPSF asserted numerous objections to his handling of the R-Case and approval of the Union's proposed unit. The ARD overruled all of UPSF's objections and

[2] The Rule now requires objecting parties to submit offers of proof, and allows Regional Directors to decline to order an objections hearing if they deem the offer insufficient to warrant litigation. 29 C.F.R. §102.69(a).

certified the results of the election. Decision & Certification, 3/11/2016 ("CoR"). Among other things, he ruled:

- Regarding UPSF's postponement motion: "I concluded that the special circumstances presented by the Employer's motion warranted only a one-day postponement, based upon the claim that Employer's counsel would not be able to meet with its personnel until December 16th." CoR at 4. In other words, although the Rule allows seven days in which to prepare the SOP, the ARD concluded two days was enough time for UPSF to confer with counsel.

- "The parties were advised at the beginning of the hearing that oral argument would be permitted rather than the filing of briefs." CoR at 5. As the hearing record reflects, this never happened. Tr. at 12; 295; 327-29.

- As to the inclusion of certified safety instructors and dispatchers in the unit, they "are neither included, nor excluded." CoR at 8.

- It was not error to refuse UPSF a ruling on its supervisory status argument because: "As the Board held in issuing the Final Rule, uncertainty as to the supervisory status of employees is inevitable . . . [a] decision as to Cappetta's supervisory status could not have provided the Employer the certainty it sought." CoR at 6.

- Regarding UPSF's taint argument, the Region "conducted an investigation and determined that Cappetta was not a supervisor within the meaning of [the Act]." *Id.* The ARD offered no evidentiary justification for this finding and did not mention whether the Region investigated UPSF's taint allegations.

- On election details, again ignoring UPSF's proposals, which would allow all employees to vote on site at the beginning of

> their shifts: "it was decided that a mail ballot election would ensure greater voter participation since drivers could run into problems on the road with traffic, weather, or other unforeseen circumstances and miss the manual voting sessions." CoR at 7.
>
> • Again rejecting UPSF's revised election proposal: "if a joint motion with the Petitioner was submitted it might have been acted upon. However, it is undisputed that the Union maintained that a mail ballot election was appropriate." *Id.*
>
> • Rejecting the denial of UPSF's subpoena request: "As no hearing was pending, the Region is not authorized to issue subpoenas." *Id.*

UPSF filed a request for review, advancing all of the objections and arguments it made before, during and after the hearing and election. Corrected Request for Review, 4/5/2016 ("RFR"). The Board granted review only as to Cappetta's supervisory status, and rejected the contention that he was a statutory supervisor. It denied review of all remaining issues. *See* 365 NLRB No. 113, slip op. at 1 (Jul. 27, 2017).

Chairman Miscimarra dissented, stating the Board should have reviewed UPSF's procedural challenges. *Id.* at *3-7 (Miscimarra, dissenting). Noting the case raised "complex issues," Chairman Miscimarra argued that review was warranted because "substantial issues exist regarding the impact of the [ARD's] procedural rulings on the other issues being litigated." *Id.* at *4. He noted that while he concurred with the

majority's disposition of the substantive issues, "it is difficult to have confidence in the resolution of these other issues because the record presently before the Board was obviously affected by challenged procedural rulings that my colleagues decline to review." *Id*.

SUMMARY OF ARGUMENT

The Board's Order that UPSF bargain with the Union is invalid because it is based on a bargaining unit certification produced by a one-sided process that violated UPSF's statutory and constitutional rights. The ARD repeatedly abused his discretion during the R-Case by using the Rule and Memo to deny UPSF any semblance of a fair proceeding.

Despite the complex issues posed by the Union's petition, the ARD—driven by the Rule's emphasis on speed at all costs—rebuffed UPSF's every attempt to prepare and present a complete case. He denied UPSF's reasonable requests for more time to prepare its SOP and for the hearing; refused to allow litigation of fundamental issues, such as who should be in the bargaining unit, and declined to resolve those issues later; refused to allow the hearing to continue beyond a single day; summarily denied briefing; offered UPSF a risibly inadequate amount of time to prepare oral argument; refused UPSF's request to subpoena evidence to support its

post-election objections and then cited a "lack of evidence" to deny UPSF a hearing on those objections; and ordered a mail ballot based on a misinterpretation of UPSF's election proposal, then refused to reconsider without the Union's agreement to a revised, joint proposal.

This litany of one-sided rulings violated the APA's safeguards against arbitrary and capricious agency action and abuse of discretion, the Act's guarantee of an "appropriate" pre-election hearing, and the basic right to constitutional due process. The Board then declined to review any of these rulings, weighing in only on the question of Cappetta's supervisory status.

The result is what Chairman Miscimarra predicted: an incomplete record resulting from overzealous and often arbitrary application of the Rule and Memo. The record that does exist shows that UPSF was never given a fair chance to contest the petition. The Board's finding that UPSF violated the Act cannot be enforced.

STANDING

UPSF has standing as a party aggrieved by a final order of the Board. *See* 29 U.S.C. §160(f).

ARGUMENT

A. Standard Of Review

1. UPSF's Legal Challenges

Under the APA, a federal court must overturn an agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Nat'l Fuel Gas Supply Corp. v. F.E.R.C.*, 468 F.3d 831, 833 (D.C. Cir. 2006)(citing 5 U.S.C. § 706(2)(A)). An agency's action is considered arbitrary and capricious if the agency did not "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* at 839 (internal quotations omitted). For example, a ruling that "runs counter to the evidence before the agency" should be overturned. *Id.*

This Court has stated it will not "merely rubber-stamp NLRB decisions." *Tradesmen Intern., Inc. v. NLRB*, 275 F.3d 1137 (D.C. Cir. 2002)(court must "examine carefully both the Board's findings and its reasoning, to assure that the Board has considered the factors which are relevant"). Moreover, Board action will be overturned when it fails to properly investigate relevant issues. *Jam Prods. v. NLRB*, 893 F.3d 1037, 1046 (7th Cir. 2018) (Board abused discretion by "failing to investigate or

hold a hearing" where employer's offer of proof suggested union misconduct).

Board action must also comply with the requirements of the Act. Section 9(c) requires the Board hold "an appropriate hearing" prior to an election to address questions concerning representation. 29 U.S.C. §159(c). The Board's own regulations make it "the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the Act." *NLRB v. Tito Contractors, Inc.*, 847 F.3d 724, 729 (D.C. Cir. 2017) (citing 29 C.F.R. § 102.64(b)). Further, a "Regional Director must forward to the Board all the relevant evidence underlying his report, and [the] Board abdicates its statutory responsibility when it adopts the report without reviewing the underlying evidence." *NLRB v. W. Coast Liquidators, Inc.*, 725 F.2d 532, 533 (9th Cir. 1984).

Finally, Board action must also comply with constitutional due process requirements. The due process clause of the Fifth Amendment sets forth the guarantee of basic fairness before a tribunal. U.S. Const. amend. V. It requires that the Board provide adequate prior notice of hearings. *See*

NLRB v. Blake Const. Co., Inc., 663 F.2d 272 (D.C. Cir. 1981)(Board violated employer's due process rights when it found violations not specifically alleged in the complaint and did not permit employer to address them during hearing). The Board also violates a respondent's due process rights if it holds a hearing before the respondent has had sufficient opportunity to prepare. *See, e.g. Russell-Newman Mfg. Co. v. NLRB*, 370 F.2d 980, 981 (5th Cir. 1966)(two days' notice of Board charges and refusal to grant continuance constituted a due process violation). Due process also entitles parties to reasonably necessary extensions of time. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)("myopic insistence upon expeditiousness in the face of a justifiable request for delay" constitutes due process violation). Due process challenges to agency action are reviewed *de novo* and "reviewing court[s] owe[] no deference to the agency's pronouncement on a constitutional question." *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041 (D.C. Cir. 2012).

2. Applicable Deference Standards

Normally, Board decisions are accorded considerable deference on review. This case is different.

The only potentially applicable form of controlling deference is *Auer* deference. UPSF's appeal turns primarily on the ARD's prejudicial application of the Rule and Memo, not the Act. Therefore, *Chevron* deference is inapplicable. Under *Auer v. Robbins*, an agency's interpretation of its own ambiguous regulation normally is "controlling unless plainly erroneous or inconsistent with the regulation." 519 U.S. 452, 461 (1997)(internal quotations omitted).

But that rule is inapplicable here because UPSF's challenges are not based on a claim that the Rule is ambiguous. "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). UPSF's concern is not that the ARD wrongly interpreted an ambiguous regulation, but rather that he abused the discretion the Rule vests in Regional Directors by applying its unambiguous provisions arbitrarily. The Court owes those applications no deference under *Auer*.

Even if portions of the Rule are ambiguous, the Board is still not entitled to *Auer* deference. *Auer* "is not an inexorable command in all cases." *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1208, n. 4 (2015). It is inapplicable where the challenged agency interpretation "does not reflect

the agency's fair and considered judgment on the matter in question." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 154 (2012); *Talk America, Inc. v. Michigan Bell Telephone*, 564 U.S. 50, 59 (2011). Here, the challenged rulings do not represent the Board's "fair and considered judgment," for two reasons.

First, the un-reviewed decisions of the ARD are not "judgments" of ***the Board***. The Board largely denied UPSF's RFR, ignoring its Rule challenges. Consequently, the record reflects only the ARD's (or worse, the HO's) regulatory interpretations relating to those challenges.

It is well settled that Regional Directors' decisions are not precedential. *See, e.g., Rental Uniform Service, Inc.*, 330 NLRB 334, 336, n. 10 (1999)("[W]e have long held that Regional Director's Decisions do not have precedential value"). Likewise, when the Board denies a request to review a Regional Director's decision, that ruling has no precedential value. The Regional Director's decision becomes final for purposes of administrative exhaustion, *see* 29 C.F.R. § 102.67(g), but it assumes no precedential value. Only a Board decision to grant review and adopt a Regional Director's decision sets precedent. *See, e.g., In Re Watkins Sec. Agency of Dc, Inc.*, 357 NLRB 2337, 2338 (2012)("Although the Board may have intended to give

guidance to the public by publishing its denial of review of the regional director's decision, the Board did not effectively make the regional director's decision its own, which would have required the Board to grant review and then to adopt the decision"); 79 Fed. Reg. 74450-51 (Members Miscimarra and Johnson, dissenting)(noting that Board denials of review, even where they modify or clarify factual findings or include dissents, "may not ultimately be of precedential value").

Because the ARD's decision is merely the determination of a low-level agency employee that lacks precedential value and the force of law, it is not entitled to controlling deference. In *United States v. Mead Corp.*, the Supreme Court held that low-level tariff determinations are not entitled to "*Chevron*-style" deference because they create no inter-agency precedent and carry no force of law. 533 U.S. 218 (2001). Likewise, the Court of Federal Claims has held that unpublished Customs rulings are "nonbinding disposition[s] by a low-level agency official . . . beyond the *Chevron* pale." *White & Case LLP v. United States*, 89 Fed. Cl. 12 (2009); *see also Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) ("[I]t is odd to think of Congress delegating lawmaking power to unreviewed staff decisions").

In a related vein, the Supreme Court has withheld *Auer* deference where an agency has attempted to depart suddenly from long-standing precedent. *Christopher*, 567 U.S. at 155-57. Taken together, these cases show that deference is not owed to decisions that the agency ***itself*** is not willing to treat as its formal and consistent view. As the Supreme Court said in *Auer*, deference is owed where ***the agency*** can be said to have made a controlling determination: "[B]ecause the salary-basis test is a creature of ***the Secretary's*** own regulations, ***his*** interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (emphasis added).

The Board was free to decline to review the merits of UPSF's RFR. But there is a consequence to that decision. By providing no independent analysis of the ARD's Rule and Memo interpretations, the Board has failed to offer its "fair and considered judgment" on those issues. Consequently, the Court owes them no deference under *Auer*. To qualify for deference, the Board had to adopt the ARD's interpretations. It cannot do so by denying a request to review them. *Cf. NLRB v. Tito Contractors, Inc.*, 847 F.3d at 734 (Henderson, concurring)(Board will "continue to run the risk of

a court-imposed re-do if it persists . . . [in] its drumhead procedure" of perfunctory denials of requests for review).

Second, *Auer* deference does not extend to agency interpretations contained in non-binding documents such as policy manuals or guidance memoranda. *See, e.g., Christensen* at 586 ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference"); *Orton Motor, Inc. v. United States HHS*, 884 F.3d 1205 (D.C. Cir. 2018)(No *Chevron* deference to interpretations of statute and regulation contained in agency guidance documents). Instead, they are "entitled to respect . . . but only to the extent that [they] have the power to persuade." *Christensen* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Many of the ARD's rulings are based not on the Rule itself, but on the General Counsel's view of the proper scope and application of the Rule, expressed in the Memo. So regardless of whether the Board reviewed the

ARD's rulings, the nonbinding guidance supporting them receives, if anything, only *Skidmore* deference.[3]

To the extent the Court reaches the substantive issues presented in the case—for the reasons below, it should not—the Board's findings of fact and conclusions of law are reviewed under the substantial evidence standard. *See* 29 U.S.C. §160(e)-(f).

B. The Region's Handling Of The R-Case Violated UPSF's Rights

1. Arbitrary Enforcement Of The Rule's Accelerated Pre-Election Procedures

The ARD's application of the Rule's one-sided pre-election requirements violated UPSF's rights. The Rule demands that just seven days after the notice of hearing, the employer must submit a SOP that includes every issue it intends to raise at the hearing, along with a summary of evidence. Omitted issues are waived.

Next, the Rule requires that any hearing take place the day after the SOP deadline. By contrast, union petitioners are not required to draft any statement, do not risk waiving any arguments, and of course have as much time as they want to prepare for the hearing since they control when to file

[3] The Court need not defer to the Memo at all to the extent it addresses implementation of unambiguous portions of the Rule.

the petition. The Memo adds to the employer's burden by accelerating the deadline for SOPs to noon on day seven. Memo at 6-7.

Here, the Petition was filed in the midst of the holiday season, presenting additional challenges given UPSF's increased operational demands. Although the petition sought to organize only Kutztown Drivers, the potential scope of the appropriate unit was significantly greater, calling for review of facts and circumstances involving nearly three hundred employees at nine locations in nine states. These challenges were complicated by dispersion of employees (including potential management witnesses) and the Company's transition to a new, customer-imposed delivery schedule. These challenging circumstances made it nearly impossible for UPSF to investigate and respond to the petition while meeting the Rule's unreasonably accelerated provisions.

Moreover, the Petition raised several complex issues. The bargaining unit determination alone required UPSF to quickly develop evidence on multiple factors including: (1) central control of over daily operation and labor relations, including the extent of local autonomy; (2) similarity of employee skills, functions, and working conditions; (3) the degree of employee interchange among locations; (4) the distance between locations;

and (5) bargaining history, if any exists. *See e.g., J&L Plate, Inc.*, 310 NLRB 429 (1993); *Trane*, 339 NLRB 866 (2003).

Further complicating the situation was the unsettled nature of the law concerning application of the Board's *Specialty Healthcare* decision to the multi-facility unit UPSF proposed. If applicable, *Specialty Healthcare* would require UPSF to show that employees in its proposed unit "share an overwhelming community of interest with those in the petitioned-for unit." *Id*. at *10-13.

The same was true of UPSF's burden regarding Cappetta's supervisory status and his involvement with employee card-signings. Much of this evidence existed in eyewitness testimony of UPSF managers, AAP managers with whom Cappetta interacted at Kutztown, and other UPSF Drivers. Interviewing all of these sources before the hearing was not realistic given the Rule's abbreviated deadlines.

2. Partial Denial Of UPSF's Postponement Motion

Attempting to reduce the Rule's prejudicial impact, UPSF requested a two-day extension to file its SOP (from Thursday, December 17 until Monday, December 21), and requested that the hearing be postponed from Friday, December 18 until Tuesday, December 22. The Rule expressly

authorizes Regional Directors to extend the SOP filing deadline and to postpone the hearing for up to two business days for "special circumstances," and for longer periods for "extraordinary circumstances." UPSF presented at minimum "special circumstances" warranting a brief extension. *See* 29 C.F.R. §§102.63(a); (b)(1).

Without explanation, the ARD only partially "granted" the Company's motion, ordering that the SOP be filed by noon on Friday, and that the hearing begin at 10:00 AM on Monday. This decision not only hamstrung UPSF, but increased the Union's advantage by giving it access to the Company's SOP (and all issues and facts UPSF intended to present) three days before the hearing. Had the ARD granted the Company's full request, the Union would have received the SOP one day before the hearing, as the Rule normally provides. Since the Rule did not require the Union to provide ***any*** information regarding its legal position, anticipated evidence, or witnesses, the Company was already disadvantaged. The Region's ruling exacerbated this imbalance.

The ARD's later attempts to justify his arbitrary rulings are unconvincing. He "concluded that the special circumstances presented by the Employer's motion warranted only a one-day postponement, based

upon the claim that Employer[‘s] counsel would not be able to meet with its personnel until December 16th.” CoR at 4. In other words, the ARD allowed UPSF a mere two days to submit its SOP after its ***first meeting*** with its attorneys, and a mere three business days to prepare witnesses. The ARD did not even attempt to respond to UPSF’s objections that his decision unfairly gave the Union the weekend to study and prepare responses to UPSF’s evidence. He only remarked that this “does not work to prejudice the Employer’s ability to prepare for the hearing.” *Id*.

This is nonsensical. The extra time undoubtedly aided the Union and disadvantaged the Company, particularly since the Rule barred UPSF from developing new arguments over the weekend, after its SOP was filed.

3. Procedural And Evidentiary Rulings At The Representation Hearing Violated UPSF’s Rights

UPSF was prejudiced by the numerous arbitrary rulings made by the HO and ARD during the hearing. Section 9(c) provides for an “appropriate” hearing upon due notice. *See* 29 U.S.C. § 159(c). The Region’s rigid insistence on finishing in one day, however, resulted in a hearing that fell far short of this standard.

During the hearing and with no prior notice, the HO barraged UPSF with multiple information requests. UPSF agreed to produce the documents, but was unable to do so instantly as the HO repeatedly requested. When the HO realized UPSF could not produce the records that same day, she abruptly abandoned all the requests in order to close the record. Counsel asked to hold the record open for the limited purpose of receiving the requested information; she refused. In short, it was more important for the HO to close the record in one day than it was to obtain evidence that she herself deemed relevant.[4]

The Region's arbitrary emphasis on speed harmed UPSF in other ways. For instance, the Rule states that hearings "***shall*** continue from day to day until completed unless the regional director concludes that extraordinary circumstances warrant otherwise." *See* 29 C.F.R. §102.64(c) (emphasis added). The Rule obviously contemplates that multi-day hearings will occur from time to time. Thus, hearings not naturally completed on the first day ordinarily must continue the following day.

[4] Some of what she requested—organizational charts and job descriptions—might have been helpful to the Company.

Not in this case. The HO refused UPSF's repeated requests to adjourn the hearing to the following morning, forcing the parties to present live witness testimony until almost 7:00 p.m., nearly two hours beyond the end of the normal business day. The Region's outright refusal to continue the hearing to a second day contradicted the plain language of the (already unfavorable) Rule and denied UPSF the opportunity to prepare additional evidence and testimony.

Changing decades of established Board practice, the Rule now provides for the filing of post-hearing briefs only with permission from the ARD. *See* 29 C.F.R. §102.66(h). Here, the issues and evidence plainly warranted briefing, particularly after the HO's refusal to adjourn at the end of the business day, effectively foreclosing UPSF from presenting rebuttal. But the ARD summarily denied that request as well, without explanation. Tr. at 328.

Moreover, "any party shall be entitled, upon request, to a ***reasonable*** period at the close of the hearing for oral argument." *See* 29 C.F.R. §102.66(h)(emphasis added). Without briefs, the Company's only opportunity to summarize the evidence was through argument. Allowing UPSF one evening to prepare would have been "reasonable," especially

since UPSF was hearing the Union's evidence for the first time. The ARD, however, permitted UPSF only 30 minutes to prepare. Tr. at 329-332.

Thus, at the end of an evidentiary hearing that was shortened arbitrarily and without reason, with no transcript, and without opportunity to submit a brief, UPSF was given half-an-hour to sum up the case. Anyone can conclude this was unfair.[5]

Perhaps worst of all, many of these rulings were based on off-the-record deliberations and conversations between the ARD and HO. UPSF was never allowed to speak to the ARD and has no idea of the extent to which the HO accurately explained its positions to the ARD. Thus, as Members Johnson and Miscimarra predicted, the challenged rulings were largely "made by an absentee regional director . . . who is completely dependent on second-hand information conveyed by the hearing officer." 79 Fed. Reg. at 74447.

By requesting enforcement of these rulings, the Board is asking for a "rubber-stamp." The Court cannot possibly "consider[] the factors which

[5] The Region's insistence on speeding the hearing, in the name of a "concise" record, *see* Memo at 11, is also puzzling, given that the ARD then took 15 days to issue the D&D.

are relevant to [the ARD's] choice of remedy" if the entirety of his deliberations took place behind closed doors. *Tradesmen Intern* at 1141.

The Board may point to the ARD's one-sided rationalizations in the D&D and CoR. These explanations are meritless. Most egregiously, the ARD justifies his refusal to allow briefing by asserting that: "The parties were advised at the beginning of the hearing that oral argument would be permitted rather than the filing of briefs." CoR at 5. This is simply not so.

The HO advised the parties early on that briefs could be filed "only upon special permission of the Regional Director," but she said nothing about whether the ARD had already decided against briefing. Tr. at 12. Later in the day, Union counsel reminded the HO that "you haven't made a decision about briefs." Tr. at 295. Finally, at the end of the hearing, the HO asked UPSF for "your position on the need for a brief?" Tr. at 327. It was only then that the HO—off the record of course—consulted with the ARD and informed the parties that briefs would not be allowed. Tr. at 328-29.

It is arbitrary and capricious for the ARD not only to deny UPSF a post-hearing brief where one was plainly warranted under the Rule and

Memo, but later attempt to finesse the record in order to rationalize his denial. The Court should not condone this attempt.

The Board may also contend the ARD's rulings accord with the Rule's focus on expedited election procedures. This is unconvincing given that the ARD did not issue his D&D for ***more than two weeks*** after the close of the hearing. The Region's unjustified tactic of "hurry up and wait" denied UPSF any semblance of a fair hearing.

4. Disregard Of Cappetta's Supervisory Status And Union Taint

Another example of the ARD's abuse of discretion is his refusal to address UPSF's contention that Cappetta was a statutory supervisor. This was important for three reasons. First, a pre-election determination would have settled his eligibility to vote. Second, Board law makes clear that "an employer is entitled to the undivided loyalty of its representatives." *See NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). Third, supervisory participation in card solicitations "has an inherent tendency to interfere with the employee's freedom to choose." *Harborside Healthcare, Inc.*, 343 NLRB 906, 911 (2004). Thus, any showing of interest obtained with supervisory participation is void. *See Dejana Industries, Inc.*, 336 NLRB 1202 (2001).

Pre-election determination of Cappetta's status was essential to provide UPSF fair notice of whether it could expect and require Cappetta—as a supervisor—to support UPSF during the campaign. If, as evidence suggested, Cappetta spearheaded the Union's organizing efforts, demanding that he publicly support the Company could have changed the outcome of the vote. Moreover, the Union's showing of interest was invalid to the extent it was supported by "tainted" cards Cappetta solicited. *See Harborside Healthcare, Inc.*, at 911 (finding that "solicitations [of union authorization cards by supervisors] are inherently coercive absent mitigating circumstances").

The ARD failed to address these issues before the election, D&D at 13, and paid them only lip service afterwards. UPSF submitted substantial evidence, both at the hearing and in its Offer of Proof, that Cappetta was a statutory supervisor.[6] Additionally, UPSF presented evidence establishing that Cappetta campaigned for the Union. UPSF offered to present testimony prior to the hearing, and again in its Offer of Proof, that Cappetta approached Tammy Cadman, a former temporary administrative

[6] UPSF's evidence establishing Cappetta's supervisory status is discussed in Section C.2 below.

assistant, and asked, "Do you know what's going on here? We're going to try to get a union at this location, you may want to share that with your drivers." Offer of Proof at 10; 18.

The Company also offered proof that Kutztown Operations Supervisor Matt DiBiase would testify that on January 8, 2016, he and supervisor Monte Copeland were returning to the Kutztown facility after lunch and heard a phone ringing in the office. Cappetta's personal phone was sitting in plain sight, unattended, next to his Company laptop. Cappetta was not in the immediate area. When DiBiase glanced at the phone (simply because it was ringing), its display reflected an incoming call from Union Organizer Brian Taylor. *Id*. at 19.

DiBiase's anticipated testimony would have further established Cappetta's involvement in the Union's initial organizing efforts and campaign. The date of Taylor's call to Cappetta—January 8, 2016—shows Cappetta remained in contact with the Union after the representation hearing and during the critical period before mail ballots were sent to voters.

Additionally, UPSF requested that the Region investigate Cappetta's solicitation of union cards. UPSF also sought the Region's formal review of

the cards to ascertain whether Cappetta had witnessed card signings. SOP at 14; CoR at 6. The Region was obligated to investigate. *See Perdue Farms, Inc.*, 328 NLRB 909, 911 (1999) ("Once presented with evidence that gives . . . reasonable cause to believe that the showing of interest may have been invalidated . . . further administrative investigation should be made provided the allegations of invalidity are accompanied by supporting evidence").

In dismissing the Company's contentions about Cappetta, the ARD stated:

> [T]he Employer's contention that Cappetta is a supervisor and should be excluded from the unit concerns his eligibility to vote, and I conclude that this issue need not be resolved before the election because resolution of the issue would not significantly change the size or character of the unit. Accordingly, I shall not address the Employer's arguments concerning the exclusion of Cappetta . . . from the unit, and [he] may vote under challenge.

D&D at 13. The ARD's treatment of UPSF's taint allegations was equally indifferent:

> The Employer's allegations of supervisory taint of the [Union's] showing of interest will be investigated administratively. The Board has long held that it is inappropriate to litigate such matters in representation proceedings, and accordingly I will not consider that issue in this Decision.

Id.

Later, the ARD cited the Memo to justify his rejection of UPSF's post-election objections:

> A decision as to Cappetta's supervisory status could not have provided the Employer the certainty it sought. Consequently, I find that the Employer was not prejudiced by the fact that Cappetta's supervisory status was not the subject of a preliminary decision prior to the election. *See* GC 15-06 at 18 . . . Under the Final Rule, because questions of supervisory status do not directly impact on whether or not there is a question concerning representation, regional directors may decide not to permit litigation of supervisory status prior to the election. Accordingly, [the Company's objection] is overruled.[7]

CoR at 6. In addressing the Company's objection to his prior refusal to consider the issue of supervisory taint, the ARD stated:

> The Region conducted an investigation and determined that Cappetta was not a supervisor within the meaning of Section 2(11) of the Act. Crucially, the Employer had ample opportunity to present evidence on Cappetta's supervisory status at the pre-election hearing. The Employer was not prevented from putting on its supervisory-status case. According it a second bite at the apple would serve no purpose. Since the investigation (including the record of the pre-election

[7] This rationale is baffling. A decision Cappetta was a supervisor would indeed have provided UPSF "the certainty it sought." It would have barred Cappetta from voting, allowed UPSF to treat him as a supervisor during the critical campaign period (during which his support for UPSF could have swung the vote), and might have invalidated the petition altogether if, as UPSF believed, he persuaded Drivers to support the Union.

> hearing) did not demonstrate that Cappetta was a supervisor, his involvement did not taint the Petition.

Id.

This is the entirety of the ARD's handling of these potentially dispositive issues. He described no investigative or factual findings, cited no applicable legal standards, and provided no reasoned analysis at all regarding Cappetta's supervisory authority. He simply proclaimed Cappetta was not a supervisor. And although the Region was obligated to investigate the Company's allegations of supervisory taint, there is no evidence that any such investigation actually occurred.

The Company offered proof that Drivers Willie Johnson, Kaliek Thomas, Ken Rose, Tim Hertzog, Gene Knappenberger, Don Roush, and Chris Camuso, as well as Cadman, would testify that no one from the Region ever attempted to contact them after the filing of the petition. Offer of Proof at 10. It stands to reason that any investigation would have included interviews with these individuals to determine whether Cappetta participated in card signings and/or the Union's campaign. The fact that these employees were not interviewed indicates the Region made no meaningful effort to investigate.

The ARD's treatment of these issues suggests he assumed his conclusion—that Cappetta was not a supervisor—precisely because he failed to investigate the taint issue. He all but admits this in the CoR. It is ironic that the ARD chided UPSF for seeking what he termed "a second bite of the apple." CoR at 6. The record makes abundantly clear that UPSF never got a first bite.

The ostensible purpose for prohibiting pre-election litigation of supervisory taint is to protect the identity of employees who sign cards or indicate other support for the Union. Thus, the Board prohibits employers from eliciting evidence of taint during the representation hearing and from utilizing the Board's subpoena powers to obtain signed cards as evidence.

Under the Rule, however, the pre-election hearing is the only opportunity an employer has to obtain testimony from witnesses under oath. Since UPSF was barred from inquiring about the circumstances under which the Union obtained its showing of interest, the onus was on the Region to investigate. Because the Region never indicated it had done so, the issue was left unresolved.

The ARD's analysis of Cappetta's supervisory status is not just erroneous, it is nonexistent. He punted on the issue before the election and

never returned to it afterwards. In doing so, the ARD left unanswered significant issues concerning the Company's statutory right to the undivided loyalty of its representatives, *see Yeshiva University*, *supra*, and the employees' right to election conditions free from coercion. *See Harborside Healthcare, Inc.*, *supra*.

5. Erroneous Refusal To Consider UPSF's Revised Election Proposal And Decision To Hold A Mail Ballot Election

The ARD's decision to hold a mail ballot election was at odds with Board precedent and another abuse of discretion under the Rule. The Board has long held that elections should generally be conducted manually. *San Diego Gas and Elec.*, 325 NLRB 1143, 1144 (1998) (Board's "longstanding policy, to which we adhere, has been that representation elections should as a general rule be conducted manually, either at the workplace or at some other appropriate location"); *see also* CHM §11301.2 ("The Board's longstanding policy is that representation elections should, as a general rule, be conducted manually").

When deciding whether to conduct a manual or mail ballot election, a Regional Director should consider whether voters are "scattered," meaning either: (1) they work over a wide geographic area, or (2) their work

schedules vary significantly, so that they are not present at a common location at common times. *San Diego Gas*, at 1145. Voters may be scattered "where they work in different geographic areas, work in the same areas but travel on the road, work different shifts, or work combinations of full-time and part-time schedules." *Id*. at 1145, n. 7. However, "the mere fact that employees may work multiple shifts, thereby necessitating more than one voting session during the course of the workday, is not in and of itself a sufficient basis for directing a mail ballot election." *Id*.

The Company's hearing proposal called for a one-day, single-site election with the polls open for four hours over a fourteen-hour period. Tr. 316-322. It is undisputed that Kutztown Drivers start and finish their routes at the distribution terminal. Thus, the Region easily could have conducted a manual election without any concern the voters would be "scattered" because they all would have been able to vote before leaving the terminal. Tr. at 318-21. However, the ARD erroneously decided in favor of a mail-in election, stating that "[t]he nature of [UPSF's] freight delivery service requires employees to travel long distances on highways and local roads. Traffic and weather conditions, particularly in winter, may

hinder employees from returning to the Employer's facility in time to permit them to vote." D&D at 15.

Aside from the fact the ARD's recitation was largely irrelevant (since Drivers could all have voted before leaving the terminal), his ruling was based on a misinterpretation of UPSF's original proposal. It also adopts a drastically overbroad definition of "scattered" in relation to previous Board rulings. *See e.g. Nouveau Elevator Industries, Inc.*, 326 NLRB 469, 471 (1998). Under the ARD's interpretation, manual ballot elections could not be held in the transportation industry any time employees work at locations besides the one at which they are primarily assigned. That is simply not the law.

UPSF gave the ARD a chance to correct his error with its revised election proposal, which offered a single polling time from 2:00 a.m. to 8:00 a.m. on a Wednesday of the ARD's choosing. These times assured that all employees would have ample opportunity to vote either before leaving the terminal or when they returned at the end of their route. The proposal further eliminated any possibility that voters might be "scattered" on election day.

But the ARD refused even to consider it, stating that under the Rule, "determinations on election arrangements are now expected to be made at the time the Decision and Direction of Election issues." The ARD offered no citation to support this assertion. Inexplicably, he also claimed that he might not have authority to modify his original decision. To the contrary, it was well within the ARD's broad discretion to revise election details at any point in the proceedings. The Board recognizes that election details may be worked out after the issuance of a D&D. *See* CHM §11301.3 ("a determination may not be possible until, for example, after a decision and direction of election has issued").

Any suggestion that UPSF was limited to the proposal it made at the hearing is simply incorrect. The ARD may not have wanted to revisit the election details, but his claim he was barred by the Rule is baseless. His ruling is all the more inexplicable given his assertion he might have considered a ***joint*** proposal to revise the election details—an equivocation unsupported by the Rule. If the ARD was precluded from considering UPSF's revised proposal, how could he have considered ***any*** revised proposal? The answer is simple: the ARD was not precluded from considering anything.

This ruling dramatically restricted UPSF's statutory right to campaign. *See* 29 U.S.C. §158(c). The Act permits an employer to hold campaign assemblies until twenty-four hours before a manual ballot election. *See Peerless Plywood Co.*, 107 NLRB 427 (1953). In mail ballot elections, however, employers may not hold group meetings from the time beginning twenty-four hours before the ballots are mailed until the vote count. *See Guardsmark, LLC*, 363 NLRB No. 103 (Jan. 29, 2016). The ARD's refusal to reconsider his own erroneous interpretation of UPSF's election proposal eliminated its ability to hold group employee communications ***during the final eighteen days of the campaign period***. The impact of this ruling was all the more harmful because unions have unlimited time to campaign secretly before they file a petition.

The Rule's acceleration of the pre-election period is already unfair to employers. The ARD's ruling on election details made it even worse by all but foreclosing UPSF's statutory right to campaign. This was reflected in the outcome of the vote.

6. Denial Of UPSF's Requested Subpoenas And Refusal To Hold Objections Hearing

The ARD's denial of UPSF's subpoena request and subsequent refusal to hold an objections hearing was a classic "Catch 22." The Company wanted to obtain cell phone records of Cappetta and Union organizer Brian Taylor (and perhaps others at the Union). UPSF believed these records would show frequent contact between Cappetta and the Union and demonstrate that Cappetta was a key figure in the Union's organizing campaign. Relying on the CHM, which predates the Rule and has not been revised since, the ARD denied UPSF's request on the grounds that no "currently outstanding Notice of Hearing" had been issued. He then overruled UPSF's Objections and declined to schedule a hearing, stating the Objections "are without merit." CoR at 8.

This too was an arbitrary and unsupportable ruling. The Rule authorizes a hearing on objections if "the regional director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing." 29 C.F.R. §102.69(c). Obviously, supervisory taint alone would provide for such grounds.

The CHM, however, does not provide for investigative subpoenas in the absence of a direction of hearing. The employer therefore is prohibited from utilizing the Board's subpoena process to obtain the very evidence the Rule now demands in order to justify a hearing. The result is a Catch 22: UPSF was not allowed to subpoena evidence because no hearing was scheduled; UPSF was then denied a hearing because it did not offer sufficient evidence to justify one.

The Seventh Circuit recently rejected such circular logic. In *Jam Productions, Ltd. v. NLRB*, the Board sought enforcement of its order requiring an employer to bargain following a union election. The employer challenged the order on multiple grounds, including that the union improperly referred high-paying union jobs to voters to win their support. 893 F.3d 1037, 1041-43 (7th Cir. 2018). The Regional Director, however, declined to interview any of the witnesses identified by the employer or issue subpoenas for business records the employer sought from the union. *Id* at 1044. He then refused to schedule a post-election hearing on the employer's objections.

Refusing to enforce the Board's order, the court held:

> [I]n describing the alleged deficiencies in [the employer's] offer of proof, the Board highlights precisely the Catch-22 [the employer] faced in attempting to demonstrate that the referrals were in fact an aberration from [the union's] ordinary referral operating system. For instance, the Board faults [the employer's] offer of proof for failing to provide evidence showing (1) [the union's] normal referral procedures; (2) whether the voting employees were treated differently than others with access to the referral system; or (3) whether the employees who received [union] jobs were members of [the union] or not. **But these are the very questions [the employer] sought to have answered with its offer of proof**.

Id. at 1045 (emphasis added). The Seventh Circuit rejected the Board's order on this transgression alone.

Here, the ARD placed a literally impossible restriction upon UPSF, preventing it from being able to make the showing the Rule requires. This, plus his many other arbitrary rulings, far outweigh the prejudice suffered by the employer in *Jam Productions*.

The harm to the Company was further amplified since UPSF's need for subpoenas was the result of the Region's apparent failure to investigate the supervisory taint allegation or to permit UPSF to litigate it during the pre-election hearing. By denying UPSF the opportunity to obtain relevant information, the Region foreclosed the only available mechanism left to

address the issue. Under these circumstances, the ARD's decision not to grant a hearing based on UPSF's "lack of evidence" was plainly arbitrary.

7. Failure To Decide Whether Certified Safety Instructors And Dispatchers Are Part Of The Unit

The ARD's failure to decide whether Certified Safety Instructors or Dispatchers are part of the unit, and/or whether Cappetta and David were dual-function employees, clouds the scope of UPSF's bargaining obligation and invalidates any finding UPSF violated the Act by refusing to bargain with a unit the scope of which remains uncertain.

In its SOP, UPSF explained that Cappetta and David, Drivers who also performed Dispatcher and Certified Safety Instructor duties, respectively, were dual-function employees and thus ineligible to vote. The Board has long held that "an employee with job responsibilities encompassing more than one position [is] a dual function employee." *Columbia College*, 346 NLRB 726, 728-29 (2006). Dual-function employees are included in a proposed bargaining unit only if they have a community of interest with those in the unit. The test is whether they "regularly perform duties similar to those performed by unit members for sufficient periods of time to demonstrate that they have a substantial interest in

working conditions in the unit." *Berea Publishing Co.*, 140 NLRB 516, 519 (1963).

Without explanation, the HO barred litigation on this issue. Nevertheless, evidence that does appear in the record shows Cappetta primarily performed Dispatcher duties and David primarily performed Certified Safety Instructor duties. Tr. at 149, 190-191, 219. The evidence also demonstrated that neither employee had, for some time, performed duties sufficiently similar to those performed by the bargaining unit members (i.e., road driving) to establish the requisite community of interest. *Id.* In fact, both performed functions that were at best incompatible, and at worst, antagonistic, to those performed by the Drivers. *Id.* Thus, both Cappetta and David, and any other employee who regularly performs duties as a Dispatcher or Certified Safety Instructor, should be excluded from the unit. But the ARD, apparently relying on Section 102.64(a) of the Rule, determined that the issue "need not be resolved before the election." D&D at 13.

The ARD's initial handling of this issue was bad enough. But he made it worse by never resolving the question of whether the Dispatcher and Certified Safety Instructor positions are actually part of the bargaining

unit. This is not an issue that simply fell through the cracks. The Union moved to amend its petition for the express purpose of including these classifications. Although the HO appeared to grant that request, *see* Tr. at 8-10, she never took evidence on the issue. And, in his haste to expedite the election, the ARD never ruled on the validity of the Union's amended petition. D&D at 13; CoR at 8.

In finding the Union's proposed unit appropriate, the ARD stated that he would make no determination "regarding the supervisor status of dispatchers or certified safety instructors or whether they are appropriately included in the petitioned-for bargaining unit." D&D at 5, fn 4. He again declined to make any decision on this issue in his Certification, concluding nonsensically that "certified safety instructors and dispatchers are neither included, nor excluded." CoR at 8. The Board never reviewed this ruling.

The fact that this issue is left unresolved nearly three years after the election further illustrates significant harms resulting from the ARD's application of the Rule. Influenced by the Rule's overarching emphasis on speed, the ARD concluded the R-Case without ever addressing the fundamental issue of whether an employee holding a position among those petitioned for by the Union is appropriately included in the certified unit.

As a result of the Region's (and the Board's) failure to address this issue, the Company is still in the dark as to the appropriate contours of the putative unit and the scope of its potential bargaining obligation.

The Union has requested bargaining and the Company's refusal is the purported violation upon which the underlying ULP charge was filed. But the Board's failure to address the inclusion or exclusion of Dispatchers and Certified Safety Instructors has left the parties uncertain as to the scope of UPSF's bargaining obligation. Without resolution of this issue, the question of whether the Company has unlawfully refused to bargain with the Union cannot be answered, and the Company cannot be deemed to have violated the Act.[8]

This is precisely the harm identified by Chairman Miscimarra in his dissent:

> [T]his case demonstrates that the Election Rule's extensive changes to the Board's preelection procedures inevitably draw parties into a game of 'hurry up and wait.' . . . Worse, because

[8] This issue also affected the Drivers, who were denied clarity on the scope and character of the bargaining unit they voted on. *See, e.g., NLRB v. Beverly Health & Rehab. Servs., Inc.*, 120 F.3d 262, *4 (4th Cir. 1997)(unpublished)("Where employees are led to believe" they are voting on a particular unit, and substantial changes are made to the unit after the election, "the employees have effectively been denied the right to make an informed choice").

> my colleagues deny review on most issues the Employer raises, the parties here--and most parties in other election cases--will never obtain a definitive resolution from the Board as to the issues the Board does not address, and any meaningful postelection review will only be available in the courts.

UPS Ground Freight, Inc. at 6 (Miscimarra, dissenting). As Chairman Miscimarra predicted, the R-Case is a prime example that the Rule's unwarranted emphasis on speed encourages Regional Directors to ignore important issues, and ultimately results in an election process that fails to render an acceptable (or workable) outcome.

C. The Region's Prejudicial Application Of The Rule Infects All Of The Substantive Decisions In The R-Case

The sum of the Region's many erroneous procedural rulings drastically compromised UPSF's ability to present a meaningful case. The result is an evidentiary record that was incomplete, despite the Company's best efforts. These procedural failings infect every substantive ruling in the case, leaving them fundamentally flawed. As Chairman Miscimarra observed, "it is difficult to have confidence in the resolution of these . . . issues because the record . . . was obviously affected by the challenged procedural rulings that my colleagues decline to review." *UPS Ground Freight, Inc.* at 4 (Miscimarra, dissenting). The Court should decline to

review the merits issues, since the record on which to review them was fatally compromised by the ARD's rulings.

Notwithstanding these significant and unjust disadvantages, the record still contains sufficient evidence to establish the ARD's and the Board's substantive rulings were in error.

1. The Determination That Cappetta Was Not A Supervisor Was Plain Error

Despite the severe restrictions the ARD imposed on UPSF, the Company still elicited substantial evidence that Cappetta was a statutory supervisor. The Act sets out a broad definition of the term "supervisor." It encompasses anyone who can "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action." 29 U.S.C. §152(11).

To establish supervisory status under this definition, an employer must show that: (i) the employee holds authority to engage in any one of the functions listed in Section 2(11); (ii) his exercise of such authority is not "of a merely routine or clerical nature, but requires the use of independent judgment;" and (iii) he does so in the interest of his employer. *NLRB v.*

Kentucky River Community Care, Inc., 532 U.S. 706, 711-13 (2001); *Oakwood Healthcare*, 348 NLRB 686, 687 (2006).

Here, the record demonstrated that about 80% of Cappetta's work was devoted to his Dispatcher duties. Tr. at 219, 265, 290. Cappetta regularly coordinated routes and directed Drivers to complete them, Tr. at 125, 127, 129, 135, coordinated with AAP to determine the number of routes required each day, Tr. at 126-127, identified and resolved "split routes" and "overloads," regularly assigned coverage for Driver absences, Tr. at 138, 141-142, was authorized to contact outside providers to schedule temporary drivers as needed, Tr. at 139-141, scheduled vacations and coordinated employee absences with payroll, Tr. at 142, set his own schedule, Tr. at 146-147, 157, held meetings with multiple drivers at a time, Tr. at 157, received and decided complaints from AAP concerning deliveries, Tr. at 169-170, and received and resolved complaints from drivers concerning assigned routes. Tr. at 129. Importantly, Cappetta decided which drivers to assign by exercising his independent judgment. Tr. at 272; 281-82; 310-11.

Additionally, Cappetta evaluated driver applicants and made hiring recommendations, Tr. at 174, administered pre-hire road tests and

evaluated applicant performance, supervised and evaluated and supervised driver pre-trip and post-trip duties, and performed driver skill assessments, among other tasks. Tr. at 172-174. Beginning in at least October 2015, Cappetta physically occupied the site manager's office at the Kutztown distribution center. Tr. at 187-189.

This evidence established that Cappetta performed a number of the supervisory functions contemplated by Section 2(11) of the Act. At the very least, he assigned employees work, directed their work, adjusted grievances, and made hiring recommendations. Any one of these functions would have alone been sufficient. *See Kentucky River Community Care, Inc.*, 532 U.S. at 713.

Additionally, UPSF explained in its Offer of Proof that Jeremiah Andrefski, the new on-site manager at the AAP Kutztown distribution center, would testify that in January 2016, Cappetta told him: "No offense to you Jeremiah, but I can run this place by myself. I've done it before." Offer of Proof at 7. Cappetta made this comment after the representation hearing, during which he repeatedly denied performing supervisory functions. UPSF also offered proof that Andrefski and DiBiase would testify that Drivers could not refuse Cappetta's dispatch assignments

without good cause, and that the penalty for refusing one of his assignments would be disciplinary action up to and including discharge. Offer of Proof at 8. The ARD ignored this additional evidence. CoR at 6.

Considering both the hearing testimony and the Offer of Proof, the ARD's conclusory finding that Cappetta was not a supervisor was plainly erroneous. The Board's attempt to "clean up" this issue on review—the only issue it reviewed—likewise fails. Notably, the Board did not address key evidence in UPSF's Offer of Proof. It found the record indicated Cappetta "did not have the authority to *require* a driver to accept a particular route." 365 NLRB No. 113 at 2. But UPSF proffered evidence that "Drivers cannot refuse dispatch assignments made by the dispatcher without good cause" and could be disciplined for refusing one of his assignments. Offer of Proof at 8. This evidence plainly establishes Cappetta could "assign" work under the Act. The Board, however, ignored it.

Moreover, without even attempting to review the Region's repeated procedural missteps, which infected the entire proceeding and guaranteed that the evidentiary record was incomplete, the Board's review of Cappetta's supervisory status took place in an evidentiary vacuum.

Consequently, its conclusion that Cappetta was not a supervisor is suspect, particularly when such a decision conveniently mooted other major issues the Board declined to review, such as supervisory taint.

If the Court does reach the merits of this issue and concludes Cappetta was indeed a supervisor, it cannot enforce the Board's Order. The ARD all but admits the Region never investigated UPSF's allegations of supervisory taint—it simply decided Cappetta was not a supervisor, so that the issue could be mooted. If he is a supervisor, the validity of the Union's petition is fatally compromised by his campaign activity.

2. The ARD Erred In Determining That The Bargaining Unit Was Appropriate

The Region erroneously certified a bargaining unit that is not appropriate under the Act. Section 9(a) permits the formation of "appropriate" bargaining units. *See* 29 U.S.C. § 159(a). Here, the requested unit was inappropriate because it excluded Drivers working at UPSF's eight other AAP distribution centers. The only appropriate unit is a "system-wide" unit of Drivers at all nine AAP locations.

When this case first arose, it was unclear how this determination should be made. The ARD acknowledged the Board never indicated in

Specialty Healthcare whether its "overwhelming community of interest" standard was meant to apply to "a multi-facility unit issue." D&D at 4. In the D&D, the ARD applied both *Specialty Healthcare* and traditional precedent. *Id*. at 3-12. In denying review of the bargaining unit issue, the Board would not say whether *Specialty Healthcare* should apply, *see* 365 NLRB No. 113 at *1, fn 1, so the question went unanswered. *Specialty Healthcare* has since been overruled. *See PCC Structurals, Inc*., 365 NLRB No. 160 (Dec. 15, 2017). So while the Court should not reach the merits of the appropriateness question, if it does, UPSF addresses it under traditional precedent.

The Board traditionally presumes that a unit limited to one of an employer's multiple facilities is appropriate. *J&L Plate, Inc*., 310 NLRB 429 (1993); *Bowie Hall Trucking, Inc*., 290 NLRB 41, 42 (1988). An employer can overcome the presumption by showing that the facility at issue has been merged into a more comprehensive unit or is so functionally integrated with another unit that it has lost its separate identity. *Budget Rent a Car Systems, Inc*., 337 NLRB 884, 885 (2002).

In determining whether the presumption is rebutted, the Board examines: (1) similarity of employee skills, functions and training; (2)

distance between facilities; (3) functional coordination in operations; (4) common supervision; (5) centralized control of operations and labor; (6) contact between employees at different facilities; (7) employee interchange (particularly temporary transfers) between facilities; (8) common wages, benefits and terms of employment, and (9) bargaining history, if any. *Id.*; *see also, e.g., Prince Telecom*, 347 NLRB No. 73 (2006)(approving unit of field technicians at all of employer's New York-area facilities based on centralized labor relations, uniform personnel policies, same benefits, same employee duties, and frequent interchange); *Jerry's Chevrolet, Cadillac, Inc.*, 344 NLRB No. 87 (2005)(approving unit of technicians at all four of employer's car dealerships based on centralized labor relations, high functional integration, and similarity of skills, pay and job functions)

Even the partial record the ARD permitted established that Drivers at the eight other AAP distribution centers share a community of interest with the Kutztown Drivers. The evidence demonstrated that UPSF is party to a national contract with AAP, under which it distributes AAP parts and other supplies from nine distribution centers to AAP stores in several

states. Tr. at 21-24.[9] The facilities are part of a single integrated customer service initiative specially set up just for AAP. Tr. at 24-25.

UPSF has a centralized management team (Regional Operations Manager, AAP Manager, Operational Support Supervisor, Support Manager) as well as centralized Human Resources functions that are responsible for all facilities. Tr. at 25-31; 78-79. All Drivers have the same job title, Tr. at 36, 39, and use the same tractor-trailer equipment. Tr. at 36, 39. All Drivers working under the AAP contract do the same work and do not perform work for any other UPSF customer besides AAP. Tr. at 38-39. All Drivers are evaluated under the same performance criteria, including accident frequency, safety and efficiency indicia such as "hard brakes" and "overspeed," miles per gallon on tractors, and delivery performance. Tr. at 48-51. All Drivers are employed under the same UPSF policies. Tr. at 46-47, 72. All Drivers receive roughly the same rates of pay, Tr. at 75-76; 116-118, and are entitled to the same benefits. Tr. at 105. All Drivers receive

[9] The facilities are located in Kutztown, PA, Enfield, CT, Lakeland, FL, Salina, KS, Gastonia, NC, Delaware, OH, Roanoke, VA, Hazelhurst, MS, and Thomson, GA (collectively the "AAP distribution facilities"). Tr. at 23.

substantially the same orientation, as well as specialized training from AAP. Tr. at 45-48.

Drivers at each AAP distribution facility have access to the same centralized job database and are eligible to apply for driving jobs at any other AAP distribution facility. Tr. at 51-52. In the past five years alone, twenty-seven UPSF Drivers transferred from one AAP distribution facility to another. Tr. at 52; Emp. Exh. 1. There is also significant driver interchange between locations. Tr. at 56-61. In the months just prior to the Petition, six Drivers were temporarily assigned to the AAP Kutztown distribution center from other AAP distribution facilities to assist during a shortage of drivers. Tr. at 56-66. In the three years prior, 117 Drivers were temporarily transferred to the Company's other AAP distribution facilities to perform work for a total of 413 weeks. Tr. at 60; Emp. Exh. 2. In that same time period, 44 Drivers were temporarily transferred to the AAP Kutztown distribution center from other AAP distribution facilities for a total of 163 weeks. Tr. at 65-66; Emp. Exh. 2.

UPSF structured its AAP distribution facilities under a single contract, with centralized management, a high degree of integration and Driver interchange, and nearly identical terms of employment. The

amount of transfers and interchange alone would make it nearly impossible to impose separate rights and procedures for only those Drivers at Kutztown.

These facts unquestionably establish a community of interest shared among Drivers at all nine AAP distribution facilities. The petitioned for unit is inappropriate and should have been rejected in favor of the unit proposed by UPSF. The ARD, however, erroneously discounted UPSF's evidence and approved the Union's requested unit. His decision should be rejected.

CONCLUSION

For the foregoing reasons, UPSF's petition for review should be granted and the Board's cross-application for enforcement should be denied.

Dated: October 15, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD COUNT LIMITATIONS

I, Kurt G. Larkin, counsel for petitioner and a member of the Bar of this Court, certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) that the foregoing brief of UPS Ground Freight, Inc. is proportionately spaced, has a typeface of 14 points or more, and contains 12,986 words.

Dated: October 15, 2018

/s/ Kurt G. Larkin
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CERTIFICATE OF SERVICE

I, Kurt G. Larkin, counsel for petitioner and a member of the Bar of this Court, certify that on October 15, 2018, I caused a copy of the attached Brief of Petitioner/Cross-Respondent, UPS Ground Freight, Inc., to be filed with the Clerk through the Court's electronic filing system which will send notification of such filing to:

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